ABDUL KARIM ABDUL GHANI

v.

THE LEGISLATIVE ASSEMBLY OF THE STATE OF SABAH

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI SCJ
[CIVIL APPLICATION NO. 21 OF 1987]
7 SEPTEMBER 1987

CONSTITUTIONAL LAW: *Application for leave under Article 4(4) Federal Constitution - Declaration that Constitution (Amendment) Enactment No. 3 of 1986 Sabah is invalid - Whether State Assembly is empowered to make laws relating to disqualification of members - Whether application frivolous.*

LEGAL PROFESSION: *Whether Advocate & Solicitor States of Malaya qualified to appear for applicant - Section 8 Advocates Ordinance of Sabah.*

The applicant was, at the time of the filing of the application an elected member of the Legislative Assembly of the State of Sabah for the Constituency of Bongawan and a member of USNO. The applicant feared that he might be expelled from USNO, which fear was justified for by the time the application came to be heard he was already expelled from USNO. By virtue of the new Article 18(2)(d) of the Sabah Constitution the applicant was required to vacate his seat and the seat was then declared vacant.

The applicant applied for a declaration that:

(a) the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.

(b) The Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to the Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondents' incompetence to enact the same.

A preliminary objection was raised on the qualification of Encik Shafee Abdullah to appear for the applicant. It was contended by Counsel for the respondent that s. 8 of the Advocates Ordinance of Sabah would apply and since Encik Shafee is not appearing for the government (Federal or State) he is not qualified to appear before the Supreme Court.

Held:

[1] The present proceeding is under Article 4(4) of the Federal Constitution before a Judge of the Supreme Court. The seat of the Supreme Court is Kuala Lumpur and the hearing is in Kuala Lumpur. Therefore s. 8 of the Advocates Ordinance of Sabah does not apply and Encik Shafee, a States of Malaya advocate and solicitor is qualified to appear in the proceeding.

[2] Disqualification in relation to membership of the legislature of the State is within the competency of the State Legislature to enact is indeed recognised by Federal Law in the Election (Conduct of Elections) Regulation 1981.

[3] It is also obvious in the provision of para. 5 of the Eighth Schedule to the Constitution that disqualification is a subject within the competency of a State.

[4] If the new provision is regarded as a provision for the tenure of seats of members of the State Legislature then it is certainly a State matter clearly falling under Item 7 (Machinery of State Government) of the State List in the Ninth Schedule to the Federal Constitution.

[5] Reading Item 7 of the State List with Article 74(4) it is obviously within the power of a State Legislature to enact a law in the nature of new Article 18(2)(d) of the Sabah Constitution.

[6] The application is frivolous and leave should be refused and is accordingly refused.

[Leave refused. Notice of Motion dismissed.]

Cases referred to:
East Union (M) Sdn. Bhd. v. Government of the State of Johore & Anor. [1980] 2 MLJ 143
Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No. 2) [1967] 1 MLJ 46

Legislation referred to:
Advocates Ordinance (Cap 2) (Sabah), ss. 2, 8
Election (Conduct of Elections) Regulations 1981, reg. 7
Federal Constitution, arts. 4(3), (3)(a), (b), (4), 74(1), (4)
Constitution of the State of Sabah, arts. 16, 18, (2)(d)

For the applicant - Muhammad Shafee Abdullah (B. Sugumar with him); M/s. Sugumar & Co.
For the respondent - Stephen Foo Kiat Shin, State Attorney General, Sabah

JUDGMENT

Hashim Yeop Sani SCJ:

On 20 May 1986 the Yang Di-Pertua Negeri of the State of Sabah gave his assent to an enactment cited as the Constitution (Amendment) Enactment 1986 which came into force on that date. That constitution amendment amended Article 18 of the Constitution of the State of Sabah, adding a new provision whereby an elected member shall vacate his seat in the Assembly if he resigns or is expelled from, or for any reason whatsoever ceases to be a member of, the political party of which he is a member. The applicant was at time of filing of the application an elected member of the Legislative Assembly of the State for the constituency of Bongawan and was a member of the United Sabah National Organisation (USNO), a duly registered political party in that state. The applicant in his affidavit expressed a fear that disciplinary action might be taken against him by USNO which would result in his expulsion and the consequences which follows. His fear was completely justified for by the time the application came to be heard he was already expelled from USNO. As a result of the expulsion and by virtue of the new Article 18(2)(d) of the Sabah Constitution he was required to vacate his seat and the seat was then declared vacant. The Election Commission then issued a writ to hold a by-election and the by-election will be held on 19 September 1987.

A preliminary objection was raised at the outset of the proceeding for leave. The objection was on the qualification of Encik Shafee Abdullah to appear for the applicant. It was contended by Encik Stephen Foo that s. 8 of the Advocates Ordinance of Sabah (Cap. 2) would apply and since Encik Shafee is not appearing for the government (Federal or State) he is not qualified to appear before the Supreme Court. It is to be noted that the words "to practice in Sabah" are defined in s. 2 of the Ordinance to mean "to perform **in Sabah**":

(a) any of the functions which in England may be performed by a member of the Bar as such; or

(b) any of the functions which in England may be performed by a solicitor of the Supreme Court of Judicature as such.

The present proceeding is under Article 4(4) of the Federal Constitution before a Judge of the Supreme Court. The seat of the Supreme Court is Kuala Lumpur and the hearing is in Kuala Lumpur. Therefore s. 8 of the Ordinance does not apply and Encik Shafee, a States of Malaya Advocate and solicitor is qualified to appear in the proceeding.

Now we come to the application for leave. The application is under Article 4(4) of the Federal Constitution. Proceedings for declaration under Article 4(4) of the Federal Constitution that a law is invalid on the ground mentioned in Clause 4(3), that is the legislature concerned has no power to enact it, shall not be commenced without leave of the Judge of the Supreme Court. This requirement does not apply to proceedings between Governments (Federal and State) under paras. (a) or (b) of Article 4(3) of the Constitution. See also *East Union (M) Sdn. Bhd. v. Government of the State of Johore & Anor.* [1980] 2 MLJ 143.

The applicant seeks for the following declarations.

(a) a declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.

(b) a declaration that The Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to The Constitution of the State of Sabah by addition of Clause 2(d) to Article 18 thereto is null and void and of no effect by reason of the respondents' incompetence to enact the same.

Although the declarations are not ideally worded or presented it is understood by reading the two declarations together that the applicant is seeking for a specific declaration that that part of the Constitution (Amendment) Enactment No. 3 of 1986 of Sabah carrying the addition of Clause 2(d) of Article 18 of the Sabah Constitution is invalid. It is the contention of the applicant that the State Assembly is not empowered to make laws with respect to a matter of disqualification. It is the applicant's contention also that the said Clause 2(d) of Article 18 of the Constitution of Sabah is inconsistent with the "essential provisions" contained in Part I of the 8th Schedule to the Federal Constitution. Under the same argument it is contended that the legislature of the State of Sabah has illegally and unconstitutionally usurped the powers of Parliament to legislate on the same subject as provided for by Article 74(1) of the Federal Constitution and item 6 of the Federal List.

There is no doubt in my mind that the subject of disqualification of a member of the Federal Parliament is a Federal subject. The subject of disqualification of a member of the Legislative Assembly of the State is a State subject. This is clearly put in para. 6 of the Eighth Schedule to the Federal Constitution being one of the essential provisions required by the Federal Constitution to be incorporated in the State Constitution. Disqualification in relation to membership of the legislature of the State is within the competency of the State legislature to enact is indeed recognised by Federal law in the Election (Conduct of Elections) Regulations 1981 where reg. 7 thereof allows objection to nomination to be made on the ground, *inter alia,* that the candidate is disqualified from being a member under the provision of the Constitution of the State concerned in the case of an election to a State Legislative Assembly.

It is also obvious in the provision of para. 5 of the Eighth Schedule to the Constitution that disqualification is a subject within the competency of a State, para. 5 reads as follows:

> Every citizen of or over the age of twenty-one years who is resident in the State is qualified to be a member of the Legislative Assembly, unless he is disqualified for being a member by the Federal Constitution or **this Constitution** or by any such law as is mentioned in s. 6 of the Eighth Schedule to the Federal Constitution.

Paragraph 5 has been carried as Article 16 of the Sabah Constitution word for word. The words "this Constitution" of course refer to the State Constitution of Sabah.

Finally if the new provision is regarded as a provision for the **tenure** of seats of members of the State legislature then it is certainly a State matter clearly falling under Item 7 (machinery of State Government) of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Federal Constitution reads:

> Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

Regarding Item 7 of the State List with Article 74(4) it is obviously within the power of a State legislature to enact a law in the nature of the new Article 18(2)(d) of the Sabah Constitution.

The object and purport of Article 4(4) of the Federal Constitution has already been interpreted before in *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli* (No. 2) [1967] 1 MLJ 46, 49 by Pike CJ (Borneo) with which interpretation I agree. Articles 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the Legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity in order to secure that frivolous or vexatious proceedings for such declarations are not commenced. Article 4(4) requires that the leave of a Judge of the Supreme Court must first be obtained.

In my opinion the application is frivolous and leave should be refused and is accordingly refused.

Under the circumstances I need not deal with the eleventh hour oral application of Encik Shafee to add two new parties, namely the Yang Di-Pertua Negeri of Sabah and the State Government of Sabah.

Notice of Motion dismissed.

Also found at [1988] 1 CLJ 460